United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6-23 RJR

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,185

WILLIE WHITAKER,

Appellant;

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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II.

Whether the crime of unlawful entry is a lesser included offense of first degree burglary when the statute allows conviction and the government offered evidence on the unlawfulness of the entry?

III.

Whether it is "plain error" under Rule 52(b), Fed. R. Crim. P. to fail to instruct the jury on an essential element of the crime of first degree burglary when that element was in sharp conflict?

This is an original appeal, Rule 17(c)(2)(iii), General Rules.

STATUTORY PROVISIONS

22 D.C. Code §§ 1801(a)

Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.

22 D.C. Code § 3102. Unlawful entry on property.

Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 824; Mar. 4, 1935, 49 Stat. 37, ch. 23; July 17, 1952, 66 Stat. 766, ch. 941, § 1.)

22 D.C. Code § 103. Attempts to commit crime.

Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this title, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both. (Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 905.)

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JURISDICTIONAL STATEMENT

On April 30, 1969, in the United States District Court for the District of Columbia, appellant, Willie Whitaker, was convicted of first degree burglary. Notice of appeal from the final decision was filed in a timely manner, and on June 20, 1969, this Court granted appellant's petition for leave to appeal in forma pauperis. The jurisdiction of this Court is properly

invoked pursuant to the rules of this Court and 28 U.S.C. § 1291.

REFERENCES TO RULINGS

The denial of request for instructions on attempted burglary and unlawful entry, at the close of trial April 30, 1969 is found at Tr. 77, 82. The Court's instruction on burglary in the first degree is found at Tr. 109.

STATEMENT OF THE CASE

On May 16, 1969, the appellant, Willie Whitaker, was sentenced to four to twelve year term of imprisonment for a conviction of burgulary in the first degree. (R. 9). The conviction arose out of a one count indictment returned on December 17, 1968. (R. 1).

The Trial

The trial by jury began and ended on April 30, 1969, before the Honorable June Green in the United States District Court for the District of Columbia. The government's case in chief consisted of the testimony of one witness, Mrs. Mary Fogg.

Mrs. Fogg testified that she was at home, 915 Maryland Avenue, N.E., at 10:30 a.m. on October 31, 1968, when she heard a knock at the front door. (Tr. 16). Before she could walk from her bedroom to the door she heard glass shatter and then observed a brick in the front hallway of the building (Tr. 14-17). The brick had apparently been thrown through the

glass part of the front door. (Tr. 17). After returning to her first floor bedroom to phone the police Mrs. Fogg went to the living room, at the front of the building and, through the window, observed Willie Whitaker on the sidewalk outside looking at the building. (Tr. 18-19). Whitaker then approached the front door and Mrs. Fogg retreated to her den where she secured the door by a night chain. (Tr. 19). She again telephoned the police. (Tr. 21). In the meantime someone forced the front door, entered the front hallway of the building, walked down the hallway to the den door and attempted to open it. (Tr. 19-21). After this unsuccessful attempt the intruder was heard to walk up the steps toward the second floor. (Tr. 21).

Shortly thereafter Willie Whitaker was arrested by a next door neighbor who had been summoned by Mrs. Fogg. (Tr. 21-23). Whitaker was arrested in the front hallway of the house as he walked down the steps from the second floor. (Tr. 23). Upon being questioned by the neighbor, Whitaker explained his presence as searching for someone he knew who had entered the building before him. (Tr. 23). The testimony varies here, Mrs. Fogg stated that Whitaker answered that "Willie" had broken the door. "Willie," he said, worked at a filling station around the corner. (Tr. 23). Mrs. Fogg stated that there was no filling station

around the corner. (Tr. 23). Whitaker testified that he replied "Ernest Williams" broke the door and that he followed looking for Williams when his companion did not return. (Tr. 57).

The floor plan and use of the building at 915 Maryland Avenue, N.E. were described by Mrs. Fogg during cross-examination. (Tr. 24-26, 29-31). Although the testimony concerning the floor plan was essential in two respects (1) to determine the truth of Whitaker's testimony concerning a companion; (2) to determine the degree of crime committed the record on appeal is not crystal clear on this point. This is partially due to the use, at trial, of a diagram which was not marked for identification or introduced as evidence.[1]

Mrs. Fogg's testimony was that the building was a "private home" owned by she and her husband. (Tr. 14-15, 24). Nevertheless, she admitted that she had three paying roomers on the day in question. (Tr. 24-25). One roomer lived in the basement and had a separate entrance. The other two lived on the second and attic floors and used the front door, hallway and stairs to gain ingress and egress. (Tr. 25-26). Mrs. Fogg and her husband slept in a first floor bedroom and their

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1/ A motion to supplement the record on appeal with a similar drawing is pending in the District Court.

children occupied the three other second floor bedrooms. (Tr. 24-25).

The building is detached with four rooms and a hallway on the first floor. (Tr. 14-15). All of the first floor rooms, with the exception of the living room, are in a line behind the front hallway, which opens onto the front porch. The den is first in line, followed by the bedroom and the kitchen. The kitchen opens onto the back yard. The den door leading to the hallway is secured by a night chain. The living room is on the side of the front hall and not directly connected to any of the other rooms. (Tr. 29-31). It is impossible to go from the living room to any of the other rooms except through the den door with the night latch which opens onto the front hall. (Tr. 46). The steps to the second floor are in the front hallway. (Tr. 30).

Following Mrs. Fogg's cross-examination defense counsel requested an early luncheon recess in order to view the layout of the house personally and to further question Mrs. Fogg. (Tr. 50-51). This request was denied. (Tr. 51). The government rested and the defense motion for a judgment of acquittal was denied without discussion. (Tr. 53).

The appellant took the stand in his own behalf and denied throwing the brick through the window glass or

otherwise forcing the door open. (Tr.56-57). Whitaker st that after a night of drinking he arose at 5 a.m. at a bootlegging establishment where he had spent the night. (Tr. 53-54). He thereupon drank one-half pint of gin and went to seek employment as a "catch out" construction laborer. (Tr. 54). Along the way he met Ernest Williams and the two began further drinking. At approximately 9 a.m. he and Williams left the corner where they had been waiting to be hired and, with a "pint", began walking. (Tr. 55). According to Whitaker he had consumed "quite a bit" of alcohol by then. (Tr. 55). When the two reached the 900 block of Maryland Avenue, N.E., Williams broke the glass at 915 and walked inside (Tr. 56). Whitaker testified that he waited awhile and then went into the building in search of Williams. (Tr. 56). When he received no answer to his call on the first floor Whitaker started up the stairs in the hall toward the second floor. He went halfway up the stairs called and received no answer. (Tr. 57). Upon descending the stairs he encountered Mrs. Fogg and her two neighbors. (Tr. 57). Whitaker testified that he told them he was looking for Ernest Williams not "Willie." (Tr. 57). He further testified that he did not break-in the door, that he took nothing from the premises and had no intent to take anything. (Tr. 58).

On cross-examination Whitaker was impeached by two prior convictions for petit larceny. (Tr. 58). He admitted having only $3 or $4 at the time of his arrest and that he was spending most of his money on alcohol. (Tr. 59). He reiterated that Williams threw the brick through the door and that he merely followed Williams into the building.

The defense also called the arresting officer, Roy Hall, who testified that Whitaker had been drinking prior to his arrest. (Tr. 65). The defense rested and Hall was recalled as a rebuttal witness by the government. He testified that after arresting Whitaker he went up to the second floor of the building. He found no one there and noticed that a bedroom door was open. (Tr. 66). On cross-examination Hall admitted that he had not looked into the basement for Whitaker's companion. (Tr. 68).

Both sides rested with the proviso by defense counsel that he be allowed to reopen if his attempt to look at the interior of the building furnished any helpful information as to the means of ingress and egress. (Tr. 70). Counsel maintained that this information might disprove the charge of burglary in the first degree. (Tr. 70). The Court, defense counsel and the prosecutor then engaged in a discussion of the necessity for such evidence and the timing of defense counsel's request. (Tr. 71-75). The Court refused to order that defense counsel be permitted entry

into the building.

After the luncheon recess defense counsel informed the Court that he had been denied entry into the premises at 915 Maryland Avenue, N.E. by Mrs. Fogg's husband. (Tr.73-74). The government rested its case. (Tr.85).

Motion For Judgment of Acquittal

Based upon the fact that all of the testimony agreed that Whitaker did not enter any of the rooms on the first floor except the hallway and the lack of proof that he had entered any of the rooms on the second floor counsel requested a judgment of acquittal on the theory that Whitaker had only entered into a common hallway used by roomers and not a part of Mrs. Fogg's dwelling or private living quarters. (Tr. 75). The Court replied that the defendant had tried to enter and "But for the chain on the door, he would have." (Tr. 76). Counsel replied that "still places him in the hallway." (Tr. 76). The discussion ended there without ruling by the Court on the motion for acquittal.

The Instructions

Defense counsel requested instructions on the lesser offenses of attempted burglary in the first degree and unlawful entry as well as an instruction on intoxication (Tr. 76). He referred to these instructions by number as standard

instructions 46, 115 and 125.[2] The Court denied the attempt instruction after hearing the prosecutor argue that such an instruction was improper since there was no dispute concerning entry. (Tr. 77). The unlawful entry instruction was denied after extended argument. (Tr. 77-83). The Court agreed that unlawful entry was not a lesser included offense to first degree burglary because burglary, can, under the statute, be committed even if the defendant has permission to enter and unlawful entry by definition requires the lack of consent. (Tr. 83). The Court did agree, however, to grant the intoxication instruction. (Tr. 84).

There was no discussion concerning the exact instruction detailing the elements of the crime of burglary in the first degree. The Court gave the following instruction after reading the first degree burglary statute to the jury. (Tr. 109):

> The essential elements of first degree burglary, each of which the Government must prove beyond a reasonable doubt are:
>
> One, that the defendant broke and entered or entered without breaking a building that was occupied;

2/ Although there is no further identification of the exact instruction requested it appears that counsel was referring to the Standard Jury Instructions prepared and published by the Jr. Bar Association of the District of Columbia.

> and Two, that at the time he did so the defendant had specific intent to break and carry away any part of the building or any fixture or other thing attached to or connected with the building or to commit any criminal offense therein.

(Tr. 109) (emphasis supplied). The Court went on to explain intent and the lack of necessity that anything is actually taken. Nowhere in the instruction, however, did the Court specify that the building entered must be a dwelling or sleeping apartment. (Tr. 109). There was also no instruction concerning what a dwelling or sleeping apartment might be. No objection was made to the instruction. (Tr. 113).

Thereupon, the jury retired and returned with a verdict of guilty of burglary in the first degree.(Tr. 115). On May 29, 1969, the Court sentenced the appellant to serve four to twelve years, said sentence to be consecutive to any sentence then in existence. (R. 9).

SUMMARY OF ARGUMENT

The appellant urges three basic errors on this appeal. (1) The evidence was in conflict as to whether or not the part of the building entered was only a common hallway or whether it was part of the "dwelling or sleeping apartment" of the complainant. In face of this conflict the trial court refused to instruct the jury on the crime of attempted burglary in the first degree. This was error under Rule 31(c), Fed. R. Crim. Pr., as interpreted in Stevenson v. United States, 162 U.S. 313 (1896) (federal statute preceeding rule), that in spite of "overwhelming" evidence to the contrary the lesser included offense instruction must be given where there is "some" evidence to support it.

(2) The evidence was also in conflict concerning the appellant's intent upon entering the building. He testified that his mission inside the building did not include the commission of any crime within. In spite of this the trial court refused to instruct the jury on the crime of unlawful entry under the theory that it was not a lesser included offense of first degree burglary. Under the facts of this case and the burglary statute the appellant could have been found to have committed the lesser offense of unlawful entry. Stewart v. United States, 116 U.S. App. D.C. 411, 324 F.2d 443 (1963). The only difference between

the two crimes in this case is the intent aspect. The appellant is entitled to an instruction of his theory of defense. Levine v. United States, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958).

(3) The trial court erred in instructing the jury on the elements of first degree burglary by substituting "building" for the phrase "dwelling or sleeping apartment" which is required by 22 D.C. Code § 1801(a) (Supp. 1969). Even though there was no objection this was "plain error" under Rule 52(b), Fed. R. Cr. Pr. Byrd v. United States, 119 U.S. App. D. C. 360, 342 F.2d 939 (1965).

ARGUMENT

I. Where the evidence in a first degree burglary case is in conflict as to whether the defendant actually entered any part of the "dwelling" section of a building and where the evidence is also in conflict concerning the defendant's intent upon illegally entering part of a building the Court was in error when it refused to grant the defendant's requests for instructions on the lesser included offenses of attempted burglary and unlawful entry.

The rule in federal courts governing instructing the jury on the possibility of returning a verdict of guilty on a lesser included offense instead of the offense charged in the indictment is found in Rule 31(c), Fed. R. Crim. Pr. which states:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Although Rule 31(c) "is not to be read as conferring a blanket right without qualification. Quite clearly it refers to offenses for which convictions might be had upon the proof adduced." Chaifetz v. United States, 109 U.S.App. D.C. 349, 351, 288 F.2d 133, 135 (1960). In order to be entitled to an instruction on a lesser offense three prerequisites must be satisfied: (a) a proper request; (b) the lesser offense must contain elements identical to the greater offense; (c) there must be some evidence which would justify a conviction on

the lesser offense.[1] Here the appellant requested instructions on the lesser offenses of attempted burglary in the first degree and unlawful entry. Both requests were denied. The denials were based upon separate decisions concerning each request. The attempt instruction was denied because of the Court's opinion that (c) supra, the "some evidence" test, had not been satisfied. The unlawful entry instruction was denied because the Court ruled that (b) supra, the lesser included qualification, had not been satisfied. (Tr. 76-82). It is submitted that all three prerequisites were met in the case at bar and the Court erred in refusing to give instructions on attempted burglary in the first degree and unlawful entry. The requests will be dealt with in order.

(A) Attempted Burglary Instruction

A timely request for an instruction on attempted burglary was made at the end of the testimony.[2] (Tr. 76). The

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1/ Green v. United States, 127 U.S. App. D.C. 272, 383 F.2d 199 (1967); Kelley v. United States, 125 U.S. App. D. C. 205, 370 F.2d 227 (1966).

2/ Rule 30, Fed. R. Crim. Pr. requires that requested instructions be set forth in writing. Defense counsel did not techincally comply in the instant case. Instead he requested standard instruction No. 46 referring, we must assume, to Standard Jury Instruction No. 46 of Criminal Jury Instructions for the District of Columbia (1966) published by the Junior Bar Section of the Bar Association of the District of Columbia. That instruction is the general attempt instruction under 22 D.C. Code § 103. Oral requests for instructions are sufficient if the court is clearly informed of the point involved. Hull v. United States, 324 F.2d 817, 824 (5th Cir. 1963).

Court denied the request without discussion. Even though defense counsel did not state his argument for the request contemporaneously with the request he had earlier, during argument on a motion for judgment of acquittal, stated the theory to the court. (Tr. 75-76).

An attempt to commit any crime in the classical example of a lesser included offense. Simpson v. United States, 195 F.2d 721 (9th Cir. 1952). In the District of Columbia a conviction for attempt will stand despite the fact that the prosecution proved a completed crime. Fleming v. United States, 215 A.2d 839 (D.C. App. 1966). There is no question that attempted burglary in the first degree is a lesser included offense of burglary in the first degree. The essential difference between the two crimes is the failure to gain entry into the prohibited structure or area.

The remaining prerequisite for granting the instruction has been the source of many opinions. The main factor to be considered in determining whether the evidence justifies a lesser offense instruction is the right to have the jury decide issues which are not purely legal in nature. Berra v. United States, 351 U.S. 131 (1956).[3/] Thus, as long ago as Stevenson v. United States, 162 U.S. 313 (1896) the Court stated that even if the

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3/ See Sparf v. United States, 156 U.S. 51, 102 (1895).

evidence of guilt of murder is "overwhelming"

> so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury and cannot be a matter of law for the decision of the Court. Id. at 315. (emphasis supplied)

The Court also stated:

> If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. Id. at 315. (emphasis supplied)

This language has been interpreted to mean that "an instruction on a lesser included offense should not be given unless there is evidence to justify it." Burcham v. United States, 82 U.S. App. D.C. 283, 284, 163 F.2d 761, 762 (1947). More recently the rule in the District of Columbia has been refined to the extent

> that where the issue is close, the request of defense counsel may properly be given the benefit of the doubt. The danger of giving the jury a power to make punishment lenient (by downgrading the offense) is offset in part by the discretion available to the trial court on sentencing. And it is appropriate to take into account the strain on judicial administration resulting from the need for retrial if the position of the trial court is not sustained on appeal.

Belton v. United States, 127 U.S. App. D.C. 201, 207, 382 F.2d 150, 156 (1967). In Belton the Court of Appeals reaffirmed the "some evidence" in the face of "overwhelming

testimony to the contrary" test, announced in Stevenson v. United States, supra. This rule has been followed no matter how "implausible, unreliable or incredible" the testimony showing the lesser offense might be. Young v. United States, 114 U.S. App. D. C. 42, 43, 309 F.2d 662, 663 (1962) (Burger, J.). This is so because "only the jury had the right to make an evaluation of ... testimony." Id.

In assessing the evidence to determine the propriety of instructing on a lesser offense the Court is obligated to draw inferences from all or part of the evidence and, in that regard may reject part of the testimony which is inconsistent with a lesser included instruction if at least part of the testimony would support such an instruction.[4/]

In the instant case the Court need not go to the limits defined by Stevenson, Belton and Young, supra., because any construction of the testimony leads to the possible conclusion

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4/ Belton v. United States, 127 U.S. App. D. C. 201, 382 F.2d 150 150 (1967);
Broughman v. United States, 124 U.S. App. D. C. 54, 361 F.2d 71 (1966);
Young v. United States, 114 U.S. App. D. C. 42, 309 F.2d 662 (1962); see Womack v. United States, 119 U.S. App. D. C. 40, 336 F.2d 959 (1964);
Wilson v. United States, 178 F. Supp. 881 (D.C. D.C. 1959).

that the appellant did not enter into the "dwelling" or "living apartment" of Mrs. Fogg.[5] Failure to make such an entry would, of course, be dispositive of the first degree burglary charge. All of the testimony shows that the defendant entered the front door of the building, that he walked down a common hall used by two roomers as well as members of the Fogg family, that the living quarters occupied by Mrs. Fogg were behind the door leading out onto the common hallway, that this door was locked by means of a chain latch commonly used by people on their outside doors and that the defendant walked up the stairway which is also used in common by the roomers and the family. There was no evidence that he entered any of the rooms on the second floor. In short, the evidence created a question for the jury to resolve--whether or not the entry into the common hallway was an entry into the "dwelling" as required by the statute.[6]

A fundamental distinction must be made in interpreting the cases dealing with burglary and housebreaking convictions. It is conceded that cases allowing conviction of burglary or housebreaking on facts similar or analogous to those in this case may be found. Had this case been properly submitted to the jury and the same verdict now on appeal returned, it would be

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5/ 22 D.C. Code § 1801 (Supp. 1969).

6/ The Court compounded the error of refusl by failing to instruct the jury that entry had to be into a dwelling. Sec. II infra.

difficult to argue that the verdict was based on insufficient evidence of entry. However, the cases which, on similar facts, have sustained convictions of burglary have generally not dealt with denial of instructions for a lesser included offense such as attempt. Henderson v. United States, 84 U.S. App. D.C. 295, 172 F.2d 269 (1949) is a perfect example of this distinction.

Appellant need only show that the evidence would permit a verdict of attempted burglary in the first degree. In that regard State v. Pigques, 310 S.W. 2d 942 (Mo. 1958) is in point. There the defendant was tried and convicted for attempted storehouse breaking. His appeal was based on a Missouri statute which did not permit conviction for an attempt when a completed crime is proved at trial. The evidence showed that the defendant forced open and entered a warehouse outer door and then entered the warehouse. Within a few feet of the outer door was a wire mesh screen separating the entrance from the goods in the warehouse. The defendant was arrested before he gained entry into the part behind the screen. The conviction for attempt was affirmed because no completed crime would have been committed until he entered past the screen.

Questions concerning the nature of the building, the definition of legal occupant and similar elements of the crime of burglary are normally for the jury.[7] Consider the classic statement in State v. Williamson, 40 Conn. 261 (1875):

> A question having been made on that point, involving both the character of the building and its fastening, the court should not have passed upon the question as a matter of law, but should have explained the law as applicable to the subject, and then submitted the question to the jury as a matter of fact. Id. at 263.

Federal circuits have consistently ruled that matters such as that in question here--whether the common hallway was part of the dwelling should be left to the jury when they are in dispute.[8]

The rule in the District of Columbia is clear. Its importance was emphasized in Hansborough v. United States, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962) where concerning to instructions on lesser offenses, the Court stated:

> Due process commands that an accused be tried, and the jury instructed on the facts as disclosed in the record. Id. at 395 , 308 F.2d at 648..

7/ People v. Shaughnessy, 89 Mich. 130, 50 N.W. 645 (1891); State v. Williamson, 40 Conn. 261 (1875); United States v. James, 238 F.2d 681 (9th Cir. 1956); Moore v. United States, 136 A.2d 868 (D.C. App. 1957).

8/ See Greenfield v. United States, 341 F.2d 411, 119 U.S. App. D.C. 278 (1964) (whether soda pop bottle a deadly weapon); Larson v. United States, 296 F.2d 80 (10th Cir. 1961) (value of stolen goods).

A factual dispute existed as to the definition of "premises" or "sleeping apartment" and the character of the hallway. The jury should have been permitted to decide the question.

(5) Unlawful Entry Instruction

The argument in favor of the unlawful entry instruction is also compelling. A proper request was made and the theory explained to the Court.[9/] The Court rejected the request on the basis of the prosecutor's argument that unlawful entry is not a lesser included offense of first degree burglary. (Tr. 77-82).

In order to qualify as a lesser included offense under Rule 31(c), Fed. R. Cr. Pr. "the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater." Sansone v. United States, 380 U.S. 343, 350 (1965). The government contended below that burglary can be accomplished by means of an entry which is "permitted" by the lawful occupier of the premises and that since unlawful entry requires a lack of permission the lesser could never merge into the greater. (Tr. 77-22).

This theory ignores the realities of the facts in this case and the law in this Circuit. Although the indictment charged Whitaker only of "entry ... with intent to commit a

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9/ As pointed out in note 2 supra no written instructions were proffered by counsel. However, counsel made reference to standard instruction No. 115, Criminal Jury Instruction for the District of Columbia (1966). That instruction details the crime of unlawful entry. 22 D.C. Code § 3102.

criminal offense. "(R. 1), the government proved and the statut makes equally punishable as first degree burglary, a breaking without permission.[10] Where the statute allows conviction of an offense by the proof of different sets of variables the government cannot twart the defendant's "due process" right to an instruction on a lesser included offense encompassing his theory of the case by fashioning the charge in general terms.[11]

The evidence here clearly showed that Whitaker entered the building without permission. The evidence further showed that the defense theory of the case was that the entry was without the specific intent to commit any criminal offense within the building. (Tr. 58). As this Court has stated "... it is reversible error for the court to refuse on request to instruct also as to the defendant's theory of the case." Levine v. United States, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958). If the defendant's theory of the case, as here, is that he lacked the specific intent necessary to commit the greater crime charged in the indictment and he has offered "some evidence" consistent with this view the court is bound to instruct on the lesser offense if it is ar included offense. Richardson v. United States,

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10/ 22 D. C. Code § 1801 (Supp. 1969).

11/ See Jones v. United States, 362 U.S. 257, 264-65 (1960).

403 F.2d 5[illegible] (D.C. Cir. 19[illegible]). This Court has indicated that in certain cases unlawful entry is a lesser included offense to burglary in the first degree. 12/

The Court's refusal to grant either defense request for instructions on lesser included offenses definitely prejudiced the appellant. The facts revealed a tenuous first-degree burgulary case, totally lacking in evidence which is usually considered as an indicia of the specific intent required, i.e. possession of burglar tools, possession of any property from the premises, rifling of drawers, etc. The appellant's testimony, coupled with that of officer Hall show that the appellant had been drinking. Furthermore, no direct evidence shows that the appellant threw the brick through the door. In view of these factors it was quite likely that the jury would have found him guilty of an offense less serious than first degree burglary had the appropriate instructions been given.

12/ Stewart v. United States, 116 U.S. App. D.C. 411, 324 F.2d 443 (1963) where the Court stated: "... in some circumstances, as here, the elements of unlawful entry ... are comprehended within those of housebreaking ... the latter requires also a finding of larcenous intent." Id. The amendment of the housebreaking statute to its present form of first and second degree burglary does not change the thrust of this statement since a comparison of the two statutes shows that the only changes have no bearing on the basic elements of entry with intent to commit a crime. 22 D.C. Code § 1801 (1967); 22 D.C. Code § 1801 (1969 Supp.). See Kay F. Glenn v. United States, __F.2d__, No. 22, 162 (7/23/69) where the trial court did instruct the jury that unlawful entry was a lesser included offense of burglary in the first degree and the Court remanded for a new trial when the jury's verdict was not clear whether the defendant was found guilty of unlawful entry or burglary.

II. Where the Court instructed the jury that it could find the defendant guilty of first degree burglary if it found beyond a reasonable doubt that he entered a "building" which was "occupied" plain error exists because first degree burglary requires that entry be made into a "dwelling" or "sleeping apartment" within a building that is occupied.

The Court's instruction on the elements of the crime of burglary in the first degree were incomplete and misleading concerning one central issue which the defendant had placed in controversy--the nature of the place he admittedly entered without right. After reading the indictment and the applicable portion of the first degree burglary statute (22 D. C. Code § 1801(a)(Suppl 1969) to the jury the Court stated:

> The essential elements of the first degree burglary, each of which the Government must prove beyond a reasonable doubt are:
>
> One, that the defendant broke and entered or entered without breaking a building that was occupied; and
>
> Two, that at the time he did so the defendant had specific intent to break and carry away any part of the building or any fixture or other thing attached to or connected with the building or to commit any criminal offense therein.
> ***
> (Tr. 109).

This instruction, with the exception of stating that the building was occupied is the same as the Standard Criminal Instruction No. 76, Criminal Jury Instructions for the District of Columbia,

District of Columbia Junior Bar Section (1966), which defines the former crime of housebreaking, 22 D.C. Code § 1801 (1967). The amendment to the Code creating degrees of burglary depending upon the nature of the dwelling entered and the presence of anyone there occurred December 27, 1967.[13]

The essential difference, as far as this case is concerned is that the government must prove that entry was made into a "dwelling" or room used as a sleeping apartment in any building" in order to prevail on a charge of first degree burglary.[14] Here the Court in explaining the essential elements of the crime did not even mention the words dwelling or sleeping apartment, but rather substituted the word "building."

It is plain error under Rule 52, Fed. R. Crim. Pr., to fail to instruct the jury on the elements of the crime. Jones v. United States, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962). Furthermore, where the element of the crime in question is complex and not clearly apparent in meaning the definition should be explained to the jury. Screws v. United States, 325 U.S. 91, 106-07 (1945).[15]

13/ Pub. L. 90-226, section 602 title VI, 81 Stat. 736.

14/ 22 D.C. Code § 1801(a) (Supp. 1969).

15/ Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 722 (1965); Byrd v. United States, 119 U.S.App.D.C. 360, 342 939 (1965); McDonald v. United States, 109 U.S. App. D.C. 99, 284 F.2d 232 (1960); Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942). See Wheeler v. United States, 89 U.S. App. D.C. 143, 190 F.2d 663 (1951) (statute concise).

A mere reading of the statutory language is generally not enough to satisfy this requirement. Harris v. United States, 346 F.2d 182, 184 (4th Cir. 1965).[16/] This is particularly true when a reading of the statute containing a word of art such as "dwelling" is followed by an explanation of the elements substituting the word "building" for "dwelling." See Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965) (robbery statute). Such an instruction could only confuse the jury as to the proof necessary to convict.

The rule requiring full instruction on the elements has constitutional roots which are traced to the right to trial by jury:

> ... the trial judge's ommission to instruct the jury on every essential element of the crime was plain error under Rule 52(b) .... By this ommission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially affected and a new trial is required. Byrd v. United States, 119 U.S. App. D.C. 360, 363, 342 F.2d 939 940 (1965) (footnote omitted).

Failure of defense counsel to formally object to an instruction which is fundamentally deficient in its explanation of the elements of the crime is not waiver by the appellant because:

> By pleading not guilty, the accused puts the

16/ Gagliano v. United States, 366 F.2d 720 (9th Cir. 1966).

> Government to the burden of proving every element of the crime beyond reasonable doubt. Strict procedural safeguards have been erected to insure that this privilege is not lightly waived. Id. at 362, 342 F.2d 939, 941.

The law in this jurisdiction is that such an omission, without objection, is plain error according to Rule 52(b), Fed. R. Crim. Pr.[17]

17/ E.g., Jackson v. United States, 121 U.S. App.D.C. 160, 348 F.2d 772 (1965); Jones v. United States, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962); McDonald v. United States, 109 U.S. App. D.C. 99, 284 F.2d 232 (1960). See 2 Wright, Federal Practice & Procedure, Criminal, 300-01 (1969).

CONCLUSION

Appellant prays that this Court reverse the judgment of conviction and remand the case for a new trial with instructions that the trial court instruct the jury on the lesser included offenses of attempted burglary in the first degree and unlawful entry as well as an instruction that the trial court properly instruct the jury on the elements of first degree burglary including a definition of dwelling.

Respectfully submitted,

DANIEL G. GROVE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been mailed, postage prepaid, to the office of the United States Attorney, Appellate Division, United States District Court, Washington, D. C., this day of August, 1969.

DANIEL G. GROVE